

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 10, 2015

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2014AP1714

Cir. Ct. No. 2013TP161

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

**IN RE THE TERMINATION OF PARENTAL RIGHTS
TO TAMIJAH W., A PERSON UNDER THE AGE OF 18:**

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

TAMARA B.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County:
JOHN J. DIMOTTO and REBECCA BRADLEY, Judges.¹ *Affirmed.*

¹ The Honorable John J. DiMotto presided over the TPR case. The Honorable Rebecca Bradley presided over the post-dispositional motion hearing.

¶1 CURLEY, P.J.² Tamara B. appeals the denial of her post-dispositional motion, brought pursuant to WIS. STAT. §§ 48.46 and 806.07 (2011-12),³ seeking to vacate an earlier order terminating her parental rights to Tamijah W.⁴ Tamara B. maintains that she discovered new evidence following the termination of her parental rights that affects the advisability of the court’s adjudication. After a hearing, the trial court determined that no new evidence had been presented and denied the request to vacate the earlier termination order and order a new dispositional hearing. This court agrees and affirms.

BACKGROUND

¶2 Tamijah W. was born on November 20, 2009 in Mississippi, to a married couple, Tamara B. and Ernest W.

¶3 In August 2010, Tamijah W. was detained by the Bureau of Milwaukee Child Welfare (Bureau) on allegations that Tamara B. was unable to care for her daughter due to neglect and mental health instability. Tamijah W. was later diagnosed as “failure to thrive.” When Tamijah W. was first detained,

² This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2011-12). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

³ The post-disposition court found that WIS. STAT. § 806.07 did not apply as it was superseded by WIS. STAT. § 48.46(1). This court concludes that § 48.46(1m) is the relevant statute.

⁴ Tamijah W.’s father, Ernest W.’s, appeal resulted in a no-merit disposition.

Consideration of this case was delayed in part because the appeals for the child’s mother and father share an appellate record. We will extend the deadline for deciding this case to the date of this opinion. *See Rhonda R.D. v. Franklin R.D.*, 191 Wis. 2d 680, 694, 530 N.W.2d 34 (Ct. App. 1995) (we may extend the time to issue a decision in a TPR case); *see also* WIS. STAT. § 809.107(6)(e).

Tamara B. and Tamijah W. were living in a domestic violence shelter. Ernest W. was not living in Wisconsin at this time. A CHIPS⁵ order was entered in September 2010, and Tamijah W. was placed with a foster mother.

¶4 Tamara B. has been in and out of treatment for her mental illness since she was eighteen years old. She has been diagnosed with bipolar disorder and manic depression with psychosis. Tamara B. has a history of suicidal ideations and homelessness. She has self-reported multiple personalities and has attempted suicide in the past.

¶5 On March 30, 2012, Tamijah W. was returned to her parents who were again living together, having reconciled and having met the conditions for the return of their daughter. In July 2012, the Bureau re-detained Tamijah W. after it was reported by Tamara B. that: (1) Ernest W. may have burned Tamijah W. with a cigarette; (2) Ernest W. continued to abuse alcohol and other illicit drugs; and (3) Ernest W. was again physically abusive to Tamara B. Tamijah W. was diagnosed with Pervasive Developmental Disorder, a mild form of autism. Tamijah W. was placed with the same foster mother she had lived with previously.

¶6 In May 2013, the State filed a petition seeking the termination of the parental rights (TPR) of both Tamara B. and Ernest W. pursuant to WIS. STAT. § 48.415. With respect to Tamara B., the State claimed that Tamara B. had not met the conditions of return set forth in the CHIPS petition and she would not be able to meet the conditions within the next nine months. The petition also alleged

⁵ CHIPS is an acronym for Child in Need of Protection or Services.

that Tamijah W. remained a child in continuing need of protection or services pursuant to WIS. STAT. § 48.415(2); specifically, because:

- a. [Tamara B.] has failed to independently establish and maintain a home suitable to meet the needs of herself and her daughter. She is once again residing with her husband with whom she has an extensive history of domestic violence.
- b. [Tamara B.] continues to struggle with mental illness resulting in psychiatric hospitalizations and frequent use of crisis services.
- c. [Tamara B.] has failed to have successful visits with her child since Tamijah [W.] was redetained. Although [Tamara B.] is regular in her visits, she is easily overwhelmed with the child's behaviors and has to take a break from the visit after a brief period of time with her.
- d. [Tamara B.] has not demonstrated the ability to meet the daily needs of the child on a regular basis. Tamijah [W.]'s behavior frequently deteriorates around visits with the mother due to [Tamara B.]'s inability to manage the child's limitations and special needs. [Tamara B.] has not accepted Tamijah [W.]'s diagnosis of Autism and does not have an accurate perception of her abilities and functioning....

Several months after the TPR was filed, Tamara B. and Ernest W. entered no contest pleas to the grounds phase of the TPR proceeding with the understanding that the dispositional phase would be contested. In addition, Tamara B. and Ernest W. requested that a bonding assessment be conducted, which the court ordered.

¶7 The trial court conducted dispositional hearings on December 17, 2013, and March 12, 2014, during which numerous witnesses testified. The trial court rendered its decision immediately following the close of testimony. The trial court reviewed the standards and factors listed in WIS. STAT. § 48.426(3),

recognizing that pursuant to § 48.426(2), the best interest of the child is the prevailing factor in a TPR case. The trial court evaluated the testimony and found it was in Tamijah W.'s best interest if her parents' parental rights were terminated. In reaching this determination, the trial court observed, *inter alia*, that there was a history of physical abuse, neglect, medical neglect, drug and alcohol abuse and domestic violence. In addition, the trial court noted that Tamara B. suffers from debilitating mental health issues and Tamijah W. is a special needs child.

¶8 In sum, the trial court found that the parents were unable to provide the structured care that Tamijah W. needed as she required numerous resources, including weekly therapy of 25-35 hours. The trial court also noted that Tamijah W. had been in foster care for 73% of her life. In assessing the situation, the trial court had before it the recommendations of the guardian ad litem and the therapist who conducted the bonding assessment, who were requesting that the trial court find it was in Tamijah W.'s best interest that her parents' parental rights be terminated and that she be placed for adoption with her foster mother, Miss C. The trial court found that the parents lacked "the ability to provide the necessary, extremely detailed healthcare that the special needs of Tamijah W. create."

¶9 The trial court accepted the argument raised by Tamara B.'s lawyer that there was a substantial relationship between Tamijah W. and Tamara B., and less of a relationship with Ernest W.⁶ However, the trial court commented that it was the opinion of several of the expert witnesses that Tamijah W.'s foster mother, Miss C., was developing into the primary parent, and the trial court

⁶ Having a substantial relationship is one of the factors the trial court must address in a TPR case. *See* WIS. STAT. § 48.426(3)(c).

observed that she was the only one of the three who could consistently provide for Tamijah W.'s needs. Indeed, the trial court characterized the parents' relationship with Tamijah W. as "a relationship without responsibility."

¶10 With regard to the issues that were raised in the post-disposition motion, the trial court heard several of the witnesses testify that it would be in Tamijah W.'s best interest if she continued to have contact with her biological parents after the adoption and heard that Miss C. agreed that once she adopted Tamijah W., she would be willing to allow their relationship to prosper. However, Miss C. testified that if there was some conflict where contact was not good for Tamijah W., then she could not do it, but as long as things go right, she was willing and open to contact. The trial court advised the parents:

I do want to stress to you Miss B[.], I want to stress to you Mr. W[.], while your legal rights are terminated, your ability to be in Tamijah [W.]'s life will remain; but you need to work on the issues that have held you back, that have caused you to be challenged in life.

Because Miss C[.] recognizes this child has fun with you and the child in essence could have two families; but you're going to have to be good, appropriate. You have to take care of yourself as do you, Mr. W[.]

¶11 As to the status of the marriage between Tamara B. and Ernest W., the trial court heard testimony that there was a history of domestic abuse towards Tamara B. by Ernest W. and that the couple had separated multiple times in the past, but had ultimately reconciled. In addressing their relationship, one of the experts testified that even if Tamara B. and Ernest W. reconciled, or were no longer in a violent relationship, she would still recommend TPR and adoption due to Tamara B.'s mental health issues. She further testified that even if Tamara B. and Ernest W. ended their relationship, she would still recommend TPR and adoption, as there's a dynamic that tends to keep repeating itself; either Tamara B.

would date someone very similar, or she would return to Ernest W. As noted, the trial court found that Tamijah W.’s best interest required the court to terminate her parents’ parental rights.

¶12 On September 9, 2014, Tamara B. filed a motion seeking a new dispositional hearing on the grounds that “new evidence undermine[d] the advisability of the [trial] court’s order” terminating parental rights. In her motion she alleged that the promised post-termination visitation had not occurred and she claimed that she had permanently severed her relationship with Ernest W. and had no intention of resuming the relationship.

¶13 On the strength of the motion, a hearing was held at which Tamara B., Miss C. and the case manager, Mallorie Hebeker, testified. The post-disposition court, in discussing Tamara B.’s claim that she had severed her relationship with Ernest W. and therefore a new hearing was required, said: “The record does not support the proposition that but for Mr. [W.]’s presence in the home Tamijah [W.] would have been safely and appropriately cared for. That [Tamara B.] has separated herself from Mr. [W.] at this time does not constitute new evidence that affects the advisability of the Court’s disposition.” As support for this finding, the post-disposition court commented that Tamara B. herself testified that she had left Ernest W. three times and then gotten back together with him. The post-disposition court also addressed the visitation issue, ultimately finding that the curtailing of Tamara B.’s visits for a short period of time—which was done at the behest of the Bureau, not Miss C.—was not new evidence.

ANALYSIS

¶14 On appeal, Tamara B. renews the arguments raised in her post-disposition motion. WISCONSIN STAT. § 48.46(1m) allows the parent of a child

whose status has been adjudicated in an order entered pursuant to WIS. STAT. § 48.43 to petition the court for a rehearing on the basis of new evidence. See § 48.46(1m). Whether new evidence warrants a rehearing “rests in the sound discretion of the trial court.” See *Schroud v. Milwaukee Cnty. DPW*, 53 Wis. 2d 650, 654, 193 N.W.2d 671 (1972). The trial court properly exercises its discretion when it applies a proper standard of law, examines the relevant facts, and, using a demonstrated reasoning process, reaches a reasonable conclusion. *Loy v. Bunderson*, 107 Wis. 2d 400, 414-15, 320 N.W.2d 175 (1982).

¶15 This court agrees with the post-disposition court that Tamara B.’s stated intention of divorcing Ernest W. is not new evidence and Ernest W.’s presence in the home was not the only reason that Tamijah W.’s best interest lies with adoption by the foster mother. Ernest W. had issues that contributed to the advisability of terminating the parental rights of the couple, but his issues were not the only problems which prevented the parents from safely caring for their child. Ernest W. had chronic drug and alcohol problems that he either could not or would not address. There was also the issue of domestic abuse as Ernest W. had a history of abusing Tamara B. Moreover, the expert witness at the dispositional hearing had advised the trial court that she would still recommend termination even if Ernest W. was out of the picture. Further, it is well to remember that when Tamijah W. was first detained, Ernest W. was not in the state of Wisconsin. At that time, Tamara B. and Tamijah W. were in a domestic abuse shelter where Tamara B. proved herself incapable of caring for Tamijah W.

¶16 This court also agrees with the post-disposition court on the visitation issue. Tamara B. argues that not only was she promised that she would continually have contact with Tamijah W., but also the trial court found it was feasible for Tamijah W. to have a relationship with her parents, given the views of

Miss C. The post-disposition hearing took place about six months after the termination. Tamara B. complained that during those months Miss C. only allowed her three phone calls with Tamijah W. With respect to this issue, the post-disposition court noted that Miss C.'s promise that she would permit contact with Tamara B. and Ernest W. was conditional. As noted, Miss C. said that: "If I am to adopt her, I would like to continue for Tamara [B.] and Ernest [W.] to see her ... [b]ut if there is some conflict where it's going to not be good for Tamijah [W.], then I couldn't do it. But as long as things go right, I am willing and open to do it." However, at the time of the post-disposition hearing, Miss C. had not yet adopted Tamijah W. In the meantime, the trial court had given the Bureau authority over guardianship, placement, and care responsibility for Tamijah W. It was not Miss C. who curtailed the visitation with Tamijah W., but the case manager, on the recommendation of Tamijah W.'s therapist. As the post-disposition court pointed out:

Ms. Hebeker explained that she told [Miss C.] to put any visits on hold until Tamijah [W.] is more [s]table. Ms. Hebeker testified that visits continue to be reassessed and that visits are not at this time in Tamijah [W.]'s best interest because she exhibits behavioral issues after phone calls with [Tamara B]. ... and this is a short-term plan to stabilize her and get her used to listening to one mom....

Additionally, the post-disposition court remarked: "The fact that in the short term Tamijah [W.]'s therapist believes face-to-face visits with the biological parents are not in Tamijah [W.]'s best interest does not constitute new evidence that affects the advisability of the Court's disposition." This court agrees that curtailing Tamara B.'s visits for a short period of time is not new evidence.

¶17 In sum, Tamara B.'s arguments are unavailing. Neither the separation from Ernest W. nor the temporary hold on visitation are new evidence

that affected the advisability of the trial court's adjudication. Therefore, the order is affirmed.

By the Court.—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)4.

